

ND-2020-30 E/C
293913

Remittance ID:3435117 Authorization
Number:26PRLDA0
Successful Authorization -- Date Paid: 8/31/20
FILE COPY ONLY!!

READ INSTRUCTIONS CAREFULLY BEFORE PROCEEDING		FEDERAL COMMUNICATIONS COMMISSION REMITTANCE ADVICE FORM 159 PAGE NO 1 OF 1		APPROVED BY OMB 3060-059	
(1) LOCKBOX				SPECIAL USE	
				FCC USE ONLY	
SECTION A - Payer Information					
(2) PAYER NAME (if paying by credit card, enter name exactly as it appears on your card) Wiley Rein LLP				(3) TOTAL AMOUNT PAID (dollars and cents)	
(4) STREET ADDRESS LINE NO. 1 1776 K Street, N.W.					
(5) STREET ADDRESS LINE NO. 2					
(6) CITY Washington				(7) STATE DC	(8) ZIP CODE 20006-2304
(9) DAYTIME TELEPHONE NUMBER (INCLUDING AREA CODE) 235				(10) COUNTRY CODE (IF NOT IN U.S.A.) US	
FCC REGISTRATION NUMBER (FRN) AND TAX IDENTIFICATION NUMBER (TIN) REQUIRED					
(11) PAYER (FRN)				(12) FCC USE ONLY	
IF PAYER NAME AND THE APPLICANT NAME ARE DIFFERENT, COMPLETE SECTION B IF MORE THAN ONE APPLICANT, USE CONTINUATION SHEETS (FORM 159-C)					
(13) APPLICANT NAME BellSouth Telecommunications, LLC d/b/a AT&T NC & d/b/a					
(14) STREET ADDRESS LINE NO. 1 1120 20th Street, NW					
(15) STREET ADDRESS LINE NO. 2 Suite 1000					
(16) CITY Washington				(17) STATE DC	(18) ZIP CODE 20036
(19) DAYTIME TELEPHONE NUMBER (INCLUDING AREA CODE)				(20) COUNTRY CODE (IF NOT IN U.S.A.) US	
FCC REGISTRATION NUMBER (FRN) AND TAX IDENTIFICATION NUMBER (TIN) REQUIRED					
(21) APPLICANT (FRN)				(22) FCC USE ONLY	
COMPLETE SECTION C FOR EACH SERVICE, IF MORE BOXES ARE NEEDED, USE CONTINUATION SHEET					
(23A) FCC Call Sign/Other ID N/A		(24A) Payment Type Code(PTC) TPC		(25A) Quantity 1	
(26A) Fee Due for (PTC)		(27A) Total Fee		FCC Use Only	
(28A) FCC CODE 1 N/A		(29A) FCC CODE 2 ATTNC/SCv.DukeEnergyProg			
(23B) FCC Call Sign/Other ID		(24B) Payment Type Code(PTC)		(25B) Quantity	
(26B) Fee Due for (PTC)		(27B) Total Fee		FCC Use Only	
(28B) FCC CODE 1		(29B) FCC CODE 2			

RECEIVED

SEP 08 2020

PSC SC
MAIL / DMS

COMPLAINT INTAKE FORM
FOR COMPLAINTS FILED UNDER SECTIONS 208, 224, 255, 716, AND 717 OF THE
COMMUNICATIONS ACT OF 1934, AS AMENDED

1. Case Name: BellSouth Telecommunications, LLC d/b/a AT&T North Carolina and d/b/a AT&T South Carolina v. Duke Energy Progress, LLC
2. Complainant's Name, Address, Phone and Facsimile Number, e-mail address (if applicable): BellSouth Telecommunications, LLC d/b/a AT&T North Carolina and d/b/a AT&T South Carolina, One CNN Center, 1424C, Atlanta, GA 30303, P 214-757-3357, F 214-746-2211
3. Defendant's Name, Address, Phone and Facsimile Number (to the extent known), e-mail address (if applicable): Duke Energy Progress, LLC, 410 South Wilmington Street, Raleigh, NC 27601
4. Complaint alleges violation of the following provisions of the Communications Act of 1934, as amended: 47 U.S.C. § 224

Answer Yes, No, or N/A to the following:

- Y 5. Complaint conforms to the specifications prescribed by 47 CFR § 1.721.
- Y 6. If Complaint concerns pole attachments, Complaint also conforms to the specifications prescribed by 47 CFR § 1.1404.
- Y 7. Complaint conforms to the format and content requirements of the Commission's rules, including but not limited to:
- Y a. If damages are sought, the Complaint comports with the specifications prescribed by 47 CFR § 1.723.
 - Y b. Complaint contains a certification that complies with 47 CFR § 1.722(g).
 - Y c. Complaint contains a certification that complies with 47 CFR § 1.722(h).
 - Y d. Complaint includes an information designation that complies with 47 CFR § 1.722(i).
 - Y e. Complaint attaches copies of all affidavits, tariff provisions, written agreements, offers, counter-offers, denials, correspondence, documents, data compilations, and tangible things in the complainant's possession, custody, or control, upon which the complainant relies or intends to rely to support the facts alleged and legal arguments made in the Complaint.
 - Y f. Complaint attaches a certificate of service that conforms to the specifications prescribed by 47 CFR §§ 1.47(g) and 1.734(f).
 - Y g. Complaint attaches verification of payment of filing fee in accordance with 47 CFR §§ 1.722(k) and 1.1106.
- N/A 8. If Complaint is filed pursuant to 47 U.S.C. § 271(d)(6)(B), complainant indicates whether it is willing to waive the 90-day complaint resolution deadline.
- Y 9. Complainant has service copy of Complaint by hand-delivery on either the named defendant or one of the defendant's registered agents for service of process in accordance with 47 CFR §§ 1.47(e) and 1.734(c).
- Y 10. If more than ten pages, the Complaint contains a table of contents and summary, as specified in 47 CFR § 1.49(b) and (c).
- Y 11. Complainant has filed the correct number of copies required by 47 CFR § 1.51(c), if applicable, and 47 CFR § 1.734(b).
- N/A 12. If Complaint is by multiple complainants, it complies with the requirements of 47 CFR § 1.725(a).
- N/A 13. If Complaint involves multiple grounds, it complies with the requirements of 47 CFR § 1.725(b).
- N/A 14. If Complaint is directed against multiple defendants, it complies with the requirements of 47 CFR § 1.734.
- Y 15. Complaint conforms to the specifications prescribed by 47 CFR § 1.49.

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH
TELECOMMUNICATIONS, LLC
d/b/a AT&T NORTH CAROLINA and
d/b/a AT&T SOUTH CAROLINA,

Complainant,

v.

DUKE ENERGY PROGRESS, LLC,

Defendant.

Proceeding No. 20-____
Bureau ID No. EB-20-MD-____

POLE ATTACHMENT COMPLAINT

**BELLSOUTH TELECOMMUNICATIONS,
LLC d/b/a AT&T NORTH CAROLINA and
d/b/a AT&T SOUTH CAROLINA**

By Counsel:

Robert Vitanza
Gary Phillips
David Lawson
AT&T SERVICES, INC.
1120 20th Street NW, Suite 1000
Washington, DC 20036
(214) 757-3357

Christopher S. Huther
Claire J. Evans
Frank Scaduto
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006
(202) 719-7000
chuther@wiley.law
cevens@wiley.law
fscaduto@wiley.law

Date: September 1, 2020

RECEIVED
SEP 08 2020
PSC SC
MAIL / DMS

PUBLIC VERSION

TABLE OF CONTENTS

I.	SUMMARY	1
II.	PARTIES AND JURISDICTION.....	3
III.	DUKE ENERGY PROGRESS HAS LONG CHARGED AT&T UNJUST AND UNREASONABLE POLE ATTACHMENT RENTAL RATES.	6
A.	AT&T Is Entitled To The New Telecom Rental Rate Under The Commission’s 2018 <i>Third Report And Order</i>	7
1.	The New Telecom Rate Presumption Applies, But Duke Energy Progress Charges AT&T Rates That Are Far Higher.	7
2.	AT&T Is Entitled To The New Telecom Rate Because Duke Energy Progress Cannot Rebut The Presumption.....	9
B.	Even Apart From The 2018 <i>Third Report and Order</i> , AT&T Was Entitled To Just And Reasonable Rates Back To 2011.	16
C.	AT&T Should Pay A Properly Calculated New Telecom Rate And Be Refunded Its Overpayments.....	22
IV.	COUNT I – UNJUST AND UNREASONABLE RATES	25
V.	REQUEST FOR RELIEF	27
	INFORMATION DESIGNATION	29
	RULE 1.721(M) VERIFICATION.....	30
	DECLARATION OF PAYMENT.....	31
	CERTIFICATE OF SERVICE	32

* Certain information in this Pole Attachment Complaint and its supporting Affidavits and Exhibits has been designated confidential pursuant to 47 C.F.R. § 1.731. The designated information is marked with a text box in the confidential version of these pleadings and is redacted in the public version.

PUBLIC VERSION

I. SUMMARY

BellSouth Telecommunications, LLC d/b/a AT&T North Carolina and d/b/a AT&T South Carolina (“AT&T”) files this Complaint against Duke Energy Progress, LLC (“Duke Energy Progress”) seeking a reduction of exceptionally high pole attachment rates that Duke Energy Progress has overcharged for years. Despite AT&T’s request for and efforts to negotiate “just and reasonable” rates to which it is entitled by law, Duke Energy Progress failed to provide even a single rate proposal in response to AT&T’s repeated requests—despite phone calls, correspondence, and two face-to-face executive-level meetings discussing the issues that form the basis of this Complaint.¹

In 2011, the Federal Communications Commission (“Commission”) issued its *Pole Attachment Order*, which found that incumbent local exchange carriers (“ILECs”), including AT&T, are “entitled to pole attachment rates, terms and conditions that are just and reasonable.”² For almost a decade, AT&T has been entitled to “the same rate as [a] comparable provider” where it attaches to an electric utility’s poles pursuant to materially comparable terms and conditions.³ This makes sense—AT&T competes with the competitive local exchange carriers (“CLECs”) and cable companies that pay the Commission’s new telecom and cable rates;

¹ In a related case filed by AT&T’s Florida affiliate against Duke Energy Progress’s Florida affiliate, the Enforcement Bureau ordered Duke Energy Florida to provide a written response to AT&T Florida by September 11, 2020. *See* Letter Order, *BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Duke Energy Florida, LLC*, Proceeding No. 20-276, Bureau ID No. EB-20-MD-003 (Aug. 28, 2020). AT&T would also still welcome a settlement proposal from Duke Energy Progress by September 11, 2020 and does not oppose an Order placing this case in abeyance until September 11, 2020 to allow for such a proposal from Duke Energy Progress.

² *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5327-28, 5331 (¶¶ 202, 209) (2011) (“*Pole Attachment Order*”).

³ *Id.* at 5336 (¶ 217).

provides telephone, video, broadband, and other advanced services from facilities that occupy a similar amount of space on utility poles as these competitors; and is protected by the same right under 47 U.S.C. § 224 to “just and reasonable” rates.

Duke Energy Progress refuses to charge AT&T the lawful just and reasonable new telecom rate. Most recently, it charged AT&T [REDACTED] per pole for 2019 rent, *nearly* [REDACTED] times the \$7.84 per pole rate produced by the Commission’s new telecom rate formula. Duke Energy Progress’s overcharging continues despite the 2018 *Third Report and Order*, which found that the new telecom rate is the presumptive “just and reasonable” rate for ILECs under “new and newly renewed” agreements.⁴ The new telecom rate presumption applies here—the parties’ Joint Use Agreement (“Agreement” or “JUA”) is a newly renewed agreement. And under the Commission’s presumption, AT&T is entitled to the new telecom rate—which was \$7.84 per pole in 2019—unless Duke Energy Progress can prove that the JUA provides AT&T net material benefits that advantage AT&T over its competitors, justifying a higher rate.

In the 15 months since negotiations began, Duke Energy Progress has not documented or quantified the value of any actual or alleged benefit. Instead, its executives theorized at an executive-level meeting that benefits *may* exist—and offered the same generic examples commonly asserted by power companies that either do not exist under the JUA, apply equally to AT&T’s competitors, or confirm that AT&T bears unique costs under the JUA that disadvantage AT&T relative to its competitors. Duke Energy Progress did not follow up in writing about its generalized claims as AT&T requested or provide AT&T access to executed license agreements to permit a comparison. And, having first refused outright to lower AT&T’s rates or even make

⁴ *In the Matter of Accelerating Wireline Broadband Deployment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705 (2018) (“*Third Report and Order*”).

PUBLIC VERSION

a rate offer, Duke Energy Progress's representatives then stalled and prolonged negotiations with an illusory promise of an enterprise-wide rate offer that would provide rate relief to AT&T and affiliated ILECs operating in other States. The promised offer never arrived, leaving AT&T no choice but to file this Complaint to challenge Duke Energy Progress's exceptionally high rates.

Duke Energy Progress's rates are unlawfully high under any analysis. Even if Duke Energy Progress could rebut the new telecom rate presumption, the Commission set the pre-existing telecom rate—which was \$11.88 per pole for the 2019 rental year—as the maximum rate a utility can lawfully charge an ILEC. Yet Duke Energy Progress still charged AT&T [REDACTED] times that rate.

Duke Energy Progress has not provided any lawful basis for charging AT&T a rate higher than the new telecom rate. With AT&T facilities attached to over 148,000 poles, Duke Energy Progress continues to charge AT&T about [REDACTED] million each year over the lawful new telecom rate. The Commission should enforce its new telecom rate presumption and refund the amounts Duke Energy Progress unlawfully collected during the applicable statute of limitations period. Doing so will stop Duke Energy Progress's longstanding violation of the law and provide the competitively neutral pole attachment rates Congress guaranteed by statute and the Commission found essential to achieving its competition and broadband deployment goals.

II. PARTIES AND JURISDICTION

1. Complainant AT&T is an ILEC that provides telecommunications and other services in North Carolina and South Carolina. It is a Georgia limited liability company with a principal place of business at One CNN Center, 1424C, Atlanta, GA 30303. AT&T may be reached through undersigned counsel at (214) 757-3357.

2. Defendant Duke Energy Progress owns and controls poles in North Carolina and South Carolina that are used, in whole or in part, for wire communications. Duke Energy Progress is a subsidiary of Duke Energy Corporation and is not owned by a railroad, a person who is cooperatively organized, or a person owned by the Federal Government or a State. It is a North Carolina company with a principal place of business at 410 South Wilmington Street, Raleigh, NC 27601.⁵

3. AT&T and Duke Energy Progress are parties to a 2000 Joint Use Agreement, which is updated regularly and was renewed after the March 11, 2019 effective date of the *Third Report and Order*.⁶ The parties share an estimated 178,662 poles, with Duke Energy Progress owning about 148,064 of the joint use poles (83%) and AT&T owning about 30,598 of the joint use poles (17%).⁷

4. The Commission has jurisdiction over this Pole Attachment Complaint pursuant to 47 U.S.C. § 224(b), which states that it “shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall ... hear and resolve complaints concerning such rates, terms, and conditions.”⁸

5. The States of North Carolina and South Carolina have not certified to the Commission that they regulate the rates, terms, and conditions for pole attachments and so have not reverse-preempted the Commission’s jurisdiction pursuant to 47 U.S.C. § 224(c).

⁵ See Ex. 19 at ATT00238 (Excerpt, Duke Energy Form 10-K for the year ended Dec. 31, 2019).

⁶ See Ex. 1 at ATT00091-110 (JUA, with updated cost schedules); *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475); see also Section III.A.1, below.

⁷ Ex. 3 at ATT00163 (Invoice dated Dec. 4, 2019) (“2019 NC Invoice”); Ex. 4 at ATT00167 (Invoice dated Dec. 4, 2019) (“2019 SC Invoice”); see also Ex. B at ATT00027 (Aff. of D. Miller, Aug. 31, 2020 (“Miller Aff.”) ¶ 6).

⁸ 47 U.S.C. § 224(b)(1).

PUBLIC VERSION

6. This is one of two related complaints filed with the Commission based, at least in part, on the same claims and same set of facts.⁹ A separate action between the parties has not been filed with any court or other government agency based on the same claim or same set of facts, in whole or in part, and AT&T does not seek prospective relief that is identical to the relief proposed or at issue in a notice-and-comment rulemaking proceeding that is currently before the Commission.¹⁰

7. Prior to the filing of this Complaint, AT&T notified Duke Energy Progress in writing of the allegations that form the basis of this Complaint and invited a response within a reasonable time.¹¹ AT&T also, in good faith, sought to settle this dispute through two face-to-face executive-level meetings and numerous follow-up communications and discussions.¹²

⁹ See *BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Duke Energy Florida, LLC*, Proceeding No. 20-276, Bureau ID No. EB-20-MD-003 (filed Aug. 25, 2020).

¹⁰ Duke Energy Corporation and other electric utilities unsuccessfully challenged the new telecom rate presumption at the U.S. Court of Appeals for the Ninth Circuit, where judgment was entered but the mandate has not yet issued. See *City of Portland v. United States*, No. 18-72689, 2020 WL 4669906 (9th Cir. Aug. 12, 2020). Another group of electric utilities sought review of the Commission's new telecom rate presumption in a petition for reconsideration at the FCC, but the pending petition does not impact the effectiveness of the presumption and cannot impact AT&T's statutory right to just and reasonable pole attachment rates for use of Duke Energy Progress's poles.

¹¹ Ex. B at ATT00028-29 (Miller Aff. ¶ 10); see also, e.g., Compl. Ex. 8 at ATT00204-205 (Letter from D. Miller, AT&T, to S. Freeburn, Duke (May 22, 2019)) ("AT&T May 22, 2019 Letter"); Compl. Ex. 10 at ATT00211 (Letter from D. Miller, AT&T, to S. Freeburn, Duke (Sept. 5, 2019)); Compl. Ex. 15 at ATT00225 (Email from D. Miller, AT&T, to S. Freeburn, Duke (Dec. 18, 2019) (referencing prior exchange of rate calculations for North and South Carolina). In connection with the parties' good-faith efforts to resolve this dispute privately, certain additional settlement materials were exchanged pursuant to Federal Rule of Evidence 408 and its state law equivalents. Those materials are not included as exhibits to the Complaint. See Ex. B at ATT00029 (Miller Aff. ¶ 10 n.4).

¹² See *id.* at ATT00028-33 (Miller Aff. ¶¶ 10-17); see also Section III.B, below. Duke Energy Progress initially declared the parties "too far apart" for it to make an offer. See Ex. B at ATT00031 (Miller Aff. ¶ 15). It then stated it had reconsidered its stance and would prepare an offer, but never extended one despite repeated follow-up by AT&T. See *id.* at ATT00031-33

III. DUKE ENERGY PROGRESS HAS LONG CHARGED AT&T UNJUST AND UNREASONABLE POLE ATTACHMENT RENTAL RATES.

8. As of mid-2011, AT&T was entitled to a “competitively neutral” pole attachment rate—meaning the new telecom rate—because it attaches to Duke Energy Progress’s poles on terms and conditions that are materially comparable to those of “a telecommunications carrier or a cable operator.”¹³ But Duke Energy Progress has continued to unlawfully charge AT&T “pole attachment rates significantly higher than the [new telecom] rates charged to similarly situated telecommunications attachers.”¹⁴

9. In 2018, the Commission adopted its new telecom rate presumption to rectify reports of such persistent overcharges, finding that, for “new and newly-renewed pole attachment agreements,” ILECs are presumptively comparable to their competitors and entitled to the new telecom rate.¹⁵ In discussions with AT&T, Duke Energy Progress offered no valid basis to rebut that presumption, only positing a handful of possible and undocumented competitive advantages that do not in fact exist. Accordingly, the Commission should order Duke Energy Progress to reduce the rental rates it charges AT&T to the competitively neutral new telecom rental rate established by law over nine years ago.

(Miller Aff. ¶¶ 15-17); *see also Nevada State Cable Television Ass’n v. Nevada Bell*, 13 FCC Rcd 16774 (¶ 4) (1998) (Under Commission rules, “[t]he parties are not required to engage in extended negotiations where the parties apparently are far apart in their analysis of the issues.”).

¹³ *Pole Attachment Order*, 26 FCC Rcd at 5333-38 (¶¶ 214-220).

¹⁴ *See Third Report and Order*, 33 FCC Rcd at 7767 (¶ 123) (quotation marks omitted).

¹⁵ *Id.* at 7769 (¶ 126); 47 C.F.R. § 1.1413(b).

PUBLIC VERSION

A. AT&T Is Entitled To The New Telecom Rental Rate Under The Commission's 2018 *Third Report And Order*.

10. The Commission's new telecom rate presumption is the most recent step in the Commission's longstanding effort to ensure that "similarly situated attachers ... pay similar pole attachment rates for comparable access."¹⁶ With or without the presumption, AT&T is entitled to rate relief in this case. But the presumption does apply and entitles AT&T to the new telecom rate for its use of Duke Energy Progress's poles.

1. The New Telecom Rate Presumption Applies, But Duke Energy Progress Charges AT&T Rates That Are Far Higher.

11. AT&T is presumptively entitled to the new telecom rate because the JUA is a "newly-renewed" agreement as defined by the *Third Report and Order*. In that *Order*, the Commission applied its new telecom rate presumption to all "new and newly-renewed joint use agreements," and defined "newly-renewed agreements" to include those agreements "that are automatically renewed, *extended*, or placed in evergreen status."¹⁷ The JUA provides that it "shall *continue* in force" until it is terminated upon one year's written notice.¹⁸ Continue and extend are synonyms: "Continue" means "[t]o carry further in time, space or development: *extend*"¹⁹ and "extend" means "to lengthen, prolong; to *continue* ..." ²⁰ The JUA thus automatically extends every day that neither party provides a one-year written notice of

¹⁶ *Third Report and Order*, 33 FCC Rcd at 7768 (¶ 123).

¹⁷ *Id.* at 7770 (¶ 127 n.475) (emphasis added).

¹⁸ Ex. 1 at ATT00104 (JUA, Art. XVII) (emphasis added).

¹⁹ "Continue," *Webster's II New College Dictionary* 244 (2001) (emphasis added); *see also* "Continue," *Oxford English Dictionary* (3d ed. online) ("To carry on, keep up, maintain, go on with, persist in (an action, usage, etc.)").

²⁰ "Extend," *Oxford English Dictionary* (3d ed. online); *see also* "Extend," *Webster's II New College Dictionary* 396 (2001) ("To stretch or reach"); "Extend," *Merriam-Webster's Collegiate Dictionary* 411 (1996) ("To stretch out in distance, space, or time").

termination. Consequently, the JUA has automatically renewed or extended after the effective date of the *Third Report and Order*, and the Commission's rate presumption applies.²¹

12. Under the presumption, AT&T must be charged a properly calculated new telecom rate determined in accordance with Commission rule 1.1406(d)(2).²² Using publicly available data and pole count information provided by Duke Energy Progress, AT&T estimates that the properly calculated new telecom rate for use of Duke Energy Progress's poles averaged about \$7.40 per pole during the last 3 years.²³ Duke Energy Progress instead charged, and AT&T paid, contract rates averaging about [REDACTED] per pole:²⁴

	2017	2018	2019
Contract rate paid by AT&T (per pole)	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]
New telecom rate (per pole)	\$7.16	\$7.30	\$7.84

AT&T has thus consistently paid Duke Energy Progress contract rates that were at least [REDACTED] times the new telecom rates to which AT&T is entitled²⁵ and well above the \$26.12 per pole rate that, in part, led the Commission to adopt the new telecom rate presumption in order to

²¹ The JUA also automatically "renews" because its terms "repeat so as to reaffirm" or "begin again" absent termination by a party. See "Renew," *Webster's II New College Dictionary* 938 (2001); "Renew," *Merriam-Webster's Collegiate Dictionary* 990 (10th ed. 1996); see also *Flanagan v. Fid. Bank*, 652 A.2d 930, 932 (Pa. 1995) ("To 'renew' a contract means to begin again or continue in force the old contract" under "the plain and accepted meaning of the word 'renew.'") (citing *Black's Law Dictionary* 1296 (6th ed. 1990)).

²² 47 C.F.R. § 1.1413(b).

²³ See Ex. A at ATT00007 (Aff. of D. Rhinehart, Aug. 31, 2020 ("Rhinehart Aff.") ¶ 11).

²⁴ See *id.*; Ex. B at ATT00028 (Miller Aff. ¶ 8).

²⁵ Ex. A at ATT00007 (Rhinehart Aff. ¶ 12).

PUBLIC VERSION

accelerate rate relief to ILECs.²⁶ Duke Energy Progress's contract rates are excessively and unreasonably high.

2. AT&T Is Entitled To The New Telecom Rate Because Duke Energy Progress Cannot Rebut The Presumption.

13. The new telecom rate presumption is rebuttable, but Duke Energy Progress cannot meet its burden. Duke Energy Progress would need "clear and convincing evidence that [AT&T] receives net benefits under its pole attachment agreement with [Duke Energy Progress] that materially advantage [AT&T] over other telecommunications attachers."²⁷

14. Duke Energy Progress does not have such evidence under the ground rules that the Commission has set for this analysis: when comparing the JUA with the license agreements executed by AT&T's competitors, Duke Energy Progress must weigh and account for all of the different rights *and responsibilities* (of which there are many) placed on AT&T as compared to its competitors.²⁸ For example, an ILEC that bears the cost to perform a service itself (*e.g.*, a pole inspection) is not advantaged relative to its competitor that pays the utility pole owner to perform the same service.²⁹ In addition, reciprocal joint use agreement terms—terms that AT&T must also provide to Duke Energy Progress for its use of AT&T's poles—impose unique costs

²⁶ *Third Report and Order*, 33 FCC Rcd at 7768-69 (¶ 125).

²⁷ *Id.* at 7768 (¶ 123) (emphasis added); *see also* 47 C.F.R. § 1.1413(b).

²⁸ *Pole Attachment Order*, 26 FCC Rcd at 5335 (¶ 216 n.654) ("A failure to weigh, and account for, the different rights and responsibilities in joint use agreement could lead to marketplace distortions."); *see also* Ex. C at ATT00044-48 (Aff. of M. Peters, Aug. 31, 2020 ("Peters Aff.") ¶¶ 18-26); Ex. D at ATT00070-71 (Aff. of C. Dippon, Aug. 31, 2020 ("Dippon Aff.") ¶¶ 38-39).

²⁹ *Verizon Va. v. Va. Elec. & Power Co.*, 32 FCC Rcd 3750, 3759 (¶ 18) (EB 2017) ("*Dominion Order*") ("Where Verizon performs a particular service itself and incurs costs comparable to its competitors in performing that service, ... Dominion may not 'embed in Verizon's rental rate costs that Dominion does not incur.'"); *see also* Ex. C at ATT00041, ATT00043-44 (Peters Aff. ¶¶ 13, 17); Ex. D at ATT00071 (Dippon Aff. ¶ 39).

on AT&T that, by definition, license agreements do not impose on AT&T's competitors that use the same Duke Energy Progress poles.³⁰ In those situations, these unique costs can offset any "benefits" that might otherwise justify charging AT&T a rate higher than the new telecom rate that may be charged those competitors.³¹

15. Duke Energy Progress rejected AT&T's rate reduction request during the parties' executive-level meetings, theorizing that AT&T may enjoy "benefits" under the JUA.³² It never provided an executed Duke Energy Progress license agreement, never followed-up in writing about any actual or alleged benefits, never documented or quantified the value of any of these illusory benefits, and never identified relevant language in the JUA or its operative license agreements.³³ And, the so-called "benefits" that the executives posited during the parties' face-

³⁰ See Ex. C at ATT00047-48 (Peters Aff. ¶ 26); Ex. D at ATT00072-73 (Dippon Aff. ¶ 41); see also Comments of Duke Energy Corporation, et al. at 38, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (June 15, 2017) ("Pole ownership costs money."); Reply Comments of Progress Energy Florida n/k/a Duke Energy Florida, et al. at 28-29, *In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245 (Oct. 4, 2010) (stating that joint use agreements, unlike license agreements, require "ILECs and electric utilities [to] share the benefits (and burdens) of pole ownership").

³¹ See *Third Report and Order*, 33 FCC Rcd at 7768 (¶ 123) (requiring utility to prove that the ILEC "receives *net benefits* under its pole attachment agreement with the utility that materially advantage the incumbent LEC over other telecommunications attachers") (emphasis added); *BellSouth Telecommunications, LLC v. Fla. Power & Light Co.*, Proceeding No. 19-187, 2020 WL 2568977, at *7 (¶ 15) (EB 2020) ("*FPL 2020 Order*") ("FPL overlooks the fact that AT&T must provide many of the same advantages that FPL provides AT&T."); Ex. C at ATT00047-48 (Peters Aff. ¶ 26); Ex. D at ATT00072-73 (Dippon Aff. ¶ 41).

³² See Ex. C at ATT00038 (Peters Aff. ¶ 8).

³³ *Id.* at ATT00038-39 (Peters Aff. ¶ 9). An executive forwarded a *draft* license agreement that Duke Energy Progress apparently uses as a starting point in its negotiations, but he did not point to any specific provision in that draft to support a claim about alleged competitive benefits provided by the JUA. See *id.*; Ex. 2 at ATT00112-153 (Draft License Agreement). The draft license agreement, which may not have been signed by any attacher, cannot depict the terms and conditions applicable to "a *typical* competitor or an *average* of [AT&T's] competitors" using the

PUBLIC VERSION

to-face meetings are non-existent or not competitive benefits at all³⁴ and included several previously rejected by the Commission.

16. *First*, the executives stated that Duke Energy Progress has installed poles taller than required for electric service in order to accommodate communications attachers, trimmed trees when deploying new pole lines, and regularly inspects its pole network to proactively identify and repair damaged poles.³⁵ These alleged “benefits” extend equally to AT&T’s competitors attached *to the same poles*.³⁶ By definition, they are not *competitive* benefits that advantage AT&T over those competitors and thus, cannot rebut the presumption.³⁷

17. *Second*, the executives representing Duke Energy Progress listed “benefits” that do not exist under the JUA—and certainly are not *net* benefits because AT&T extends each of these to Duke Energy Progress.³⁸ They claimed that AT&T benefits from a different permitting

same poles in North and South Carolina. *See Dominion Order*, 32 FCC Rcd at 3759 (¶ 20) (emphasis added); *see also* Ex. C at ATT00039 (Peters Aff. ¶ 10); Ex. D at ATT00073 (Dippon Aff. ¶ 42). But even if it were somehow relevant, it still does not support Duke Energy Progress’s assertion that AT&T may enjoy net material benefits in the JUA—let alone prove AT&T in fact enjoys net material benefits that justify a rental rate higher than the new telecom rate. Ex. C at ATT00040-48 (Peters Aff. ¶¶ 11-27); Ex. D at ATT00069-75 (Dippon Aff. ¶¶ 36-46).

³⁴ Ex. C at ATT00040, ATT00042-45 (Peters Aff. ¶¶ 12, 16, 18, 20); Ex. D at ATT00069-70 (Dippon Aff. ¶ 37).

³⁵ Ex. C at ATT00040-41 (Peters Aff. ¶ 12).

³⁶ *See* 47 C.F.R. § 1.1413(b) (To rebut the presumption, a utility requires “clear and convincing evidence” that the ILEC receives net material benefits as compared to “telecommunications carriers or cable television systems providing telecommunications services *on the same poles*”) (emphasis added).

³⁷ *See id.*; *see also FPL 2020 Order*, 2020 WL 2568977, at *7 (¶ 15) (“FPL did not build its poles just to accommodate AT&T.”).

³⁸ Ex. C at ATT00047-48 (Peters Aff. ¶ 26); Ex. D at ATT00072-73 (Dippon Aff. ¶ 41); *see also FPL 2020 Order*, 2020 WL 2568977, at *7 (¶ 15) (“FPL overlooks the fact that AT&T must provide FPL many of the same advantages that FPL provides AT&T.”).

arrangement,³⁹ but the difference does not benefit AT&T, is not a material difference, and, in any event, is reciprocal.⁴⁰ They also said AT&T may be advantaged if it pays for make-ready based on a schedule with pre-set cost estimates (*i.e.*, standardized costs) instead of based on a per-project cost estimate (*i.e.*, costs specific to a project), but there should be no difference in the two approaches when *Duke Energy Progress* unilaterally sets the cost estimates and updates them regularly, including earlier this year.⁴¹ AT&T also reduces the amount of make-ready work it requires Duke Energy Progress to perform by AT&T completing much of its own make-ready and engineering work itself and by inspecting every new AT&T attachment to a Duke Energy Progress pole for compliance with safety and construction standards.⁴² AT&T's cost to complete this make-ready, engineering, and survey work is necessarily comparable to the cost to complete similar work for AT&T's competitors, although AT&T often encounters longer delays when deploying new facilities because AT&T currently is *not* eligible for one-touch make-ready or the make-ready deadlines that accelerate deployment for AT&T's competitors.⁴³

³⁹ Some of AT&T's competitors may complete and submit a [REDACTED] permit application containing the same information that AT&T *also* collects before it attaches to Duke Energy Progress's poles. *See* Ex. 2 at ATT00141 (Draft License Agreement [REDACTED]); Ex. C at ATT00043 (Peters Aff. ¶ 16).

⁴⁰ *See id.*; *Dominion Order*, 32 FCC Rcd 3750 (¶ 21) (rejecting reliance on "alleged 'benefits' to Verizon services that Verizon is likewise required to extend to Dominion under the Joint Use Agreements"); Ex. C at ATT00043 (Peters Aff. ¶ 16); Ex. D at ATT00072-73 (Dippon Aff. ¶ 41).

⁴¹ *See* Ex. C at ATT00043 (Peters Aff. ¶ 16); Ex. D at ATT00072 (Dippon Aff. ¶ 41); *see also* Ex. 1 at ATT00108 (JUA, Ex. B).

⁴² Ex. C at ATT00043-44 (Peters Aff. ¶ 17).

⁴³ *Id.* at ATT00044 (Peters Aff. ¶ 17); Ex. D at ATT00071 (Dippon Aff. ¶ 39); *see also* 47 C.F.R. § 1.1411.

PUBLIC VERSION

18. *Third*, the executives claimed that AT&T has historically defended the allocation of space to AT&T at the bottom of the communications space on a pole.⁴⁴ But the JUA does not allocate that space to AT&T.⁴⁵ And rather than defend the typical location of an ILEC's facilities, AT&T's services affiliate recently encouraged the Commission to clarify that electric utilities may *not* impose a blanket ban on the installation of facilities *below* the typical location of AT&T's wireline facilities.⁴⁶

19. AT&T also does *not* enjoy a competitive benefit when it is the lowest attacher on a pole.⁴⁷ The location does not reduce costs for AT&T because AT&T requires the same safety precautions, vehicles, and other equipment to work on its facilities as are required on its competitors' facilities located a foot or two higher on the pole.⁴⁸ But the location does *increase* costs for AT&T.⁴⁹ As the lowest attacher, AT&T is most likely to receive a request to temporarily raise its facilities to accommodate an oversized vehicle or a load that exceeds standard vertical clearance.⁵⁰ Also increasing costs, the lowest attacher is usually the last to transfer its facilities to a replacement pole, and is often required to make multiple trips to a pole because the attachers located higher on the pole delayed transferring their facilities as

⁴⁴ Ex. C at ATT00045 (Peters Aff. ¶ 20).

⁴⁵ Ex. 1 at ATT00095 (JUA, Art. III(A)) (allowing "CP&L's use of space below BellSouth").

⁴⁶ See, e.g., *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling, WC Docket No. 17-84, 2020 WL 4428179, at *3 (¶ 9 n.28) (July 29, 2020).

⁴⁷ Ex. C at ATT00045-46 (Peters Aff. ¶¶ 21-23); Ex. D at ATT00073-74 (Dippon Aff. ¶ 43); Ex. 18 at ATT00234-236 (Damage Reports).

⁴⁸ Ex. C at ATT00045 (Peters Aff. ¶ 20).

⁴⁹ *Id.*

⁵⁰ *Id.*; Ex. D at ATT00073 (Dippon Aff. ¶ 43).

scheduled.⁵¹ And the lowest attacher is more susceptible to damage to its facilities. When a pole leans (*e.g.*, from weather damage, normal wear and tear, improperly engineered or constructed competitor facilities), the lowest facilities on the pole (typically, those of AT&T) can become low-hanging without notice and vulnerable to being struck by large vehicles.⁵² In addition, the lowest facilities are more vulnerable to damage by workers ascending a pole to work on facilities that are above.⁵³ And so, while AT&T does not maintain separate records that record the damage attributable to its location on a pole and often repairs the damage without reporting it, its records nonetheless reflect the added costs AT&T's typical location on a pole has imposed.⁵⁴

20. *Finally*, the executives for Duke Energy Progress claimed it is a "benefit" to AT&T when Duke Energy Progress occasionally replaces a damaged AT&T pole following an emergency.⁵⁵ Because AT&T pays Duke Energy Progress for the cost of these pole replacements, there is no financial benefit to AT&T and no cost to Duke Energy Progress.⁵⁶ Rather, the pole replacement costs paid by AT&T are a competitive *disadvantage* as compared to AT&T's competitors, which are not required to own poles and replace them following an

⁵¹ Ex. C at ATT00044, ATT00046 (Peters Aff. ¶¶ 17, 22); Ex. D at ATT00073 (Dippon Aff. ¶ 43).

⁵² Ex. C at ATT00045-46 (Peters Aff. ¶¶ 22-23); Ex. 18 at ATT00234-236 (Damage Reports).

⁵³ Ex. C at ATT00046 (Peters Aff. ¶ 22); Ex. 18 at ATT00234-236 (Damage Reports).

⁵⁴ Ex. C at ATT00046 (Peters Aff. ¶ 23); Ex. 18 at ATT00234-236 (Damage Reports).

⁵⁵ *See* Ex. C at ATT00044 (Peters Aff. ¶ 18).

⁵⁶ *Id.*; Ex. D at ATT00070-71 (Dippon Aff. ¶ 38); *see also* *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18) ("Dominion may not 'embed in Verizon's rental rate costs that Dominion does not incur.'").

PUBLIC VERSION

emergency.⁵⁷ Duke Energy Progress did not identify any net material competitive advantage that rebuts the presumption that AT&T is entitled to the new telecom rate.⁵⁸

21. Even if Duke Energy Progress could rebut the presumption, having failed to do so during the parties' executive-level discussions, it still is overcharging AT&T. In the 2018 *Third Report and Order*, the Commission set the pre-existing telecom rate as the *maximum* "just and reasonable" rate if a utility can rebut the new telecom rate presumption with clear and convincing evidence.⁵⁹ The Commission created this "hard cap" to eliminate uncertainty arising from the 2011 *Pole Attachment Order*, which looked to the pre-existing telecom rate as a "reference point" when an agreement provides an ILEC a net material advantage over its competitors.⁶⁰

22. It is self-evident from the below table that the per pole rates that Duke Energy Progress has charged, and AT&T has paid, significantly exceed the pre-existing telecom rate:⁶¹

	2017	2018	2019
Contract rate paid by AT&T (per pole)	\$ [REDACTED]	\$ [REDACTED]	\$ [REDACTED]
Pre-existing telecom rate (per pole)	\$10.84	\$11.07	\$11.88

Even in this best-case scenario for Duke Energy Progress, it has charged AT&T pole attachment rates that averaged [REDACTED] times the pre-existing telecom rate.⁶² Thus, there is no set of

⁵⁷ See Ex. C at ATT00044-45 (Peters Aff. ¶¶ 18-19); Ex. D at ATT00070-71 (Dippon Aff. ¶ 38).

⁵⁸ 47 C.F.R. § 1.1413(b).

⁵⁹ *Third Report and Order*, 33 FCC Rcd at 7769-71 (¶¶ 126-29).

⁶⁰ *Id.* at 7771 (¶ 129); see also *Pole Attachment Order*, 26 FCC Rcd at 5336-37 (¶ 218).

⁶¹ See Ex. A at ATT00009-10 (Rhinehart Aff. ¶ 17); Ex. B at ATT00028 (Miller Aff. ¶ 8).

⁶² Ex. A at ATT00010 (Rhinehart Aff. ¶ 18).

circumstances under which the contract rates charged by Duke Energy Progress are lawful. In all events, the Commission should eliminate these extraordinary overcharges.

B. Even Apart From The 2018 *Third Report and Order*, AT&T Was Entitled To Just And Reasonable Rates Back To 2011.

23. The Commission's *Third Report and Order* simplifies this case by presuming that the new telecom rate is the "just and reasonable" rate absent clear and convincing evidence from Duke Energy Progress to the contrary. Although the Commission adopted the *Third Report and Order* in 2018, AT&T has been entitled to the "just and reasonable" new telecom rate since the July 12, 2011 effective date of the *Pole Attachment Order*. In that *Order*, the Commission issued guidance that an ILEC could justify pole attachment rate relief (based on the new telecom rate) by demonstrating that the rates were unjust and unreasonable; the direct result of unequal bargaining power; locked in by a JUA's evergreen provision; and not justified by any net material benefits that advantage AT&T over its competitors.⁶³ Duke Energy Progress's exceptionally high rental rates have all these characteristics.

24. *First*, the contract rates are not just and reasonable. The contract rates paid by AT&T during the statute-of-limitations period have averaged over [REDACTED] times the new telecom rate applicable to AT&T's competitors and over [REDACTED] times the pre-existing telecom rate.⁶⁴

⁶³ See *Pole Attachment Order*, 26 FCC Rcd at 5333-37 (¶¶ 214-18); see also Ex. D at ATT00063-75 (Dippon Aff. ¶¶ 25-46).

⁶⁴ See Ex. A at ATT00007, ATT00010 (Rhinehart Aff. ¶¶ 12, 18); Ex. B at ATT00028 (Miller Aff. ¶ 8); see also *FPL 2020 Order*, 2020 WL 2568977, at *4 (¶ 10) ("We further find that the JUA rate is unreasonable, particularly when compared with the rate FPL charges [C]LECs and cable companies to attach to the same poles."). Making matters worse, AT&T reduced the rates it charges CLECs and cable companies attached to its distribution poles to reflect the new telecom rate methodology the Commission adopted in 2011—thereby reducing AT&T's rental revenue during the same years that Duke Energy Progress increased AT&T's rates. See *Third Report and Order*, 33 FCC Rcd at 7768-69 (¶ 125) (noting concern that survey data showed ILEC rental revenue from CLECs and cable companies decreased since 2008, but ILEC rental

PUBLIC VERSION

25. The JUA rates also disproportionately divide annual pole costs between AT&T and Duke Energy Progress.⁶⁵ The Commission expected that ILECs and electric utilities would each pay “roughly the same proportionate rate given the parties’ relative usage of the pole ‘such as the same rate per foot of occupied space.’”⁶⁶ Instead, Duke Energy Progress charges AT&T a JUA rate that is about 75 percent of the rate Duke Energy Progress pays AT&T ([REDACTED] vs. [REDACTED] per pole in 2019) while occupying far more space on a pole.⁶⁷ AT&T requires space comparable to its competitors, is presumed to occupy 1 foot of pole space, and Duke Energy Progress cannot lawfully “reserve” any additional space for AT&T.⁶⁸ Duke Energy Progress, in

payments to electric utilities increased). The Enforcement Bureau previously asked ILECs to disclose the rates they charge CLECs and cable companies. *See Verizon Fla. v. Fla. Power & Light Co.*, 30 FCC Rcd 1140, 1150 (¶ 25 n.84) (2015) (“*FPL 2015 Order*”). For the 2015 through 2019 rental years, AT&T charged new telecom and cable rates that ranged from [REDACTED] per pole in North Carolina and [REDACTED] per pole in South Carolina, assuming 1 foot of space occupied. *See* Ex. A at ATT00003 (Rhinehart Aff. ¶ 2 n.1).

⁶⁵ The JUA requires AT&T to pay [REDACTED] of Duke Energy Progress’s annual pole cost without regard to rentals received from other attachers on the pole. *See* Ex. 1 at ATT00103 (JUA, Art. XV(A)); Ex. D at ATT00063, ATT00066-67 (Dippon Aff. ¶¶ 23 n.42, 31). As a result, when there are 4 communications attachers on a pole (reflecting the presumptive number of attaching communications attachers), Duke Energy Progress collects nearly [REDACTED] of its pole costs from communications attachers ([REDACTED] from AT&T and 7.4% from each attacher paying a new telecom rate) that collectively require less than half the space that Duke Energy Progress requires. *See id.* at ATT00067-68 (Dippon Aff. ¶ 32). In contrast, if Duke Energy Progress collected new telecom rates from all 4 communications attachers, Duke Energy Progress would be responsible for a far more proportional 70.4% of the pole cost for its use of 77.8% of the space. *Id.* at ATT00068 (Dippon Aff. ¶ 33).

⁶⁶ *See Dominion Order*, 32 FCC Rcd at 3760 (¶ 21 n.78) (quoting *Pole Attachment Order*, 26 FCC Rcd at 5337 (¶ 218 n.662)).

⁶⁷ Ex. B at ATT00028 (Miller Aff. ¶ 8); Ex. C at ATT00046-47 (Peters Aff. ¶ 24); Ex. D at ATT00066 (Dippon Aff. ¶ 30).

⁶⁸ *See* Ex. C at ATT00047 (Peters Aff. ¶ 25); 47 C.F.R. § 1.1410. The JUA does not, and cannot lawfully, designate any specific amount of space to AT&T. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16053 (¶ 1170) (1996) (“Permitting an [I]LEC, for example, to reserve space for local exchange service ... would favor the future needs of the [I]LEC over the current needs of the new LEC.

contrast, occupies 10.5 feet of space under the FCC's rate assumptions, which includes 3.3 feet of safety space that is "usable and used by the electric utility."⁶⁹

26. *Second*, Duke Energy Progress's substantial pole ownership advantage "continuously impacted [AT&T's] ability to negotiate a just and reasonable rate over time."⁷⁰ The FCC has previously found that an electric utility's relatively high rates coupled with its "nearly two-to-one pole ownership advantage" supported an inference of bargaining leverage, which justified rate relief for the ILEC.⁷¹ In this case, Duke Energy Progress's pole ownership advantage has consistently been greater. AT&T's earliest records show that Duke Energy Progress had a 3-to-1 pole ownership advantage as far back as 1987, which has increased further to a nearly 5-to-1 advantage today (83% to 17%).⁷² This disparity in pole ownership, coupled with a rate provision that cannot be changed without Duke Energy Progress's agreement, has

Section 224(f)(1) prohibits such discrimination among telecommunications carriers."); *see also* Ex. C at ATT00046-47 (Peters Aff. ¶ 24).

⁶⁹ *See FPL 2020 Order*, 2020 WL 2568977, at *7 (¶ 16) ("[T]he Commission has long held that the communication safety space is for the benefit of the electric utility, not communications attachers."); *Consolidated Partial Order*, 16 FCC Rcd at 12130 (¶ 51) (holding "the 40-inch safety space ... is usable and used by the electric utility"); *see also* Ex. D at ATT00066 (Dippon Aff. ¶ 30).

⁷⁰ *Dominion Order*, 32 FCC Rcd at 3757 (¶ 13 n.53); *see also Pole Attachment Order*, 26 FCC Rcd at 5335 (¶ 216); Ex. D at ATT00062-66, ATT00065-69 (Dippon Aff. ¶¶ 22-24, 29-35).

⁷¹ *Dominion Order*, 32 FCC Rcd at 3757 (¶ 13); *see also FPL 2020 Order*, 2020 WL 2568977, at *8 (¶ 18) (finding rate relief required where the electric utility owns 66% of the jointly used poles); *Pole Attachment Order*, 26 FCC Rcd at 5329 (¶ 206) (estimating that electric utilities "own approximately 65-70 percent of poles").

⁷² *See* Ex. B at ATT00027 (Miller Aff. ¶¶ 6-7); Ex. 3 at ATT00163 (2019 NC Invoice); Ex. 4 at ATT00167 (2019 SC Invoice); Ex. 7 at ATT00201-202 (1987 Pole Counts); *see also FPL 2020 Order*, 2020 WL 2568977, at *8 (¶ 18) ("the Commission in the *Pole Attachment Order* concluded that it should regulate [I]LEC joint use agreements because current, not past, pole ownership ratios had reduced [I]LEC bargaining power.").

PUBLIC VERSION

enabled Duke Energy Progress to require AT&T to pay and continue paying unlawful pole attachment rates.⁷³

27. *Third*, AT&T “genuinely lacks the ability to terminate” the unlawful rates and obtain new “just and reasonable” rates through negotiations.⁷⁴ The JUA includes an “evergreen” provision that renders the rates effectively inescapable—even if AT&T were to terminate the JUA, it would have to continue paying the contract rates.⁷⁵ And, AT&T cannot obtain a lower rate without Duke Energy Progress’s concurrence, because the JUA states that, unless both parties agree otherwise, rental rates “shall be” determined using the JUA’s rate formula.⁷⁶ AT&T asked Duke Energy Progress to renegotiate a “just and reasonable” rate as required by law and the JUA.⁷⁷ More than 15 months have passed since AT&T made that request. Yet despite numerous communications and two face-to-face meetings, Duke Energy Progress still has not made AT&T a *single* offer.⁷⁸ AT&T thus “genuinely lacks the ability to obtain a new

⁷³ See Ex. D at ATT00062-66, ATT00065-69 (Dippon Aff. ¶¶ 22-24, 29-35).

⁷⁴ See *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 216).

⁷⁵ See *FPL 2015 Order*, 30 FCC Rcd at 1150 (¶ 25) (quoting *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 216)) (finding that an evergreen clause is evidence that the ILEC “genuinely lacks the ability to terminate an existing agreement”); see also *FPL 2020 Order*, 2020 WL 2568977, at *4 (¶ 11); Ex. 1 at ATT00104 (JUA, Art. XVII) (stating that, after termination, “all such existing Attachments shall continue pursuant to and in accordance with the terms of this Agreement”).

⁷⁶ Ex. 1 at ATT00102 (JUA, Art. XIII(C)); see also *FPL 2020 Order*, 2020 WL 2568977, at *4 (¶ 11).

⁷⁷ Ex. 8 at ATT00204-205 (“AT&T May 22, 2019 Letter”); see also Ex. 1 at ATT00103 (JUA, Art. XIII(F)) (“Nothing in this Agreement shall preclude either party from the right to change the pole rental rate herein ... in order to comply with the then current ... federal law and regulations of ... the Federal Communications Commission...”).

⁷⁸ See Ex. B at ATT00028-33 (Miller Aff. ¶¶ 10-17).

arrangement” as its “attempts to negotiate a new rate with [Duke Energy Progress] in light of the *Pole Attachment Order* were unsuccessful.”⁷⁹

28. Finally, AT&T has been entitled to a new telecom rate since the 2011 effective date of the *Pole Attachment Order* for the same reason that it is entitled to a new telecom rate under the Commission’s new telecom rate presumption: Duke Energy Progress did not identify, substantiate, or quantify anything it provides AT&T under the JUA that gives AT&T a net material benefit over its competitors justifying a rental rate higher than the new telecom rate.⁸⁰

29. The 2011 *Pole Attachment Order* adopted the standard that an ILEC should pay “the same rate” as its CLEC and cable competitors if its joint use agreement “does not provide a material advantage to [the ILEC] relative to cable operators or telecommunications carriers.”⁸¹ Under this standard, AT&T should have been paying “the same rate as the comparable provider, *i.e.*, the New Telecom Rate”⁸² as of July 12, 2011 because Duke Energy Progress cannot justify a higher rate based on its generalized claims of “advantage” that do not exist.⁸³

⁷⁹ See *FPL 2020 Order*, 2020 WL 2568977, at *4-5 (¶¶ 11, 12).

⁸⁰ See *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217); *FPL 2015 Order*, 30 FCC Rcd at 1142 (¶ 7); see also Ex. C at ATT00040-48 (Peters Aff. ¶¶ 11-27); Ex. D at ATT00069-75 (Dippon Aff. ¶¶ 36-46); Section III.A.2, above. Duke Energy Progress also declined AT&T’s request for copies of executed license agreements to compare with the JUA. See Ex. 8 at ATT00205 (AT&T May 22, 2019 Letter) (“[I]f Duke Energy believes that a rate higher than the new telecom rate is justified by net competitive advantages, we request copies of Duke Energy’s executed license agreements and all data and quantifications that support its claim.”); *Dominion Order*, 32 FCC Rcd at 3759 (¶ 20) (finding electric utility failed to justify its rates where it “omitt[ed] the information needed to analyze whether, and, if so, the extent to which, Verizon has been advantaged relative to a typical competitor or an average of its competitors.”).

⁸¹ *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217) (emphasis added).

⁸² See *FPL 2015 Order*, 30 FCC Rcd at 1142 (¶ 7) (quoting *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217)) (internal quotation mark omitted).

⁸³ See Section III.A.2, above; see also Ex. C at ATT00040-48 (Peters Aff. ¶¶ 11-27); Ex. D at ATT00069-75 (Dippon Aff. ¶¶ 36-46).

PUBLIC VERSION

30. Moreover, any analysis of “competitive neutrality” must “account for ... the different rights *and responsibilities*” in joint use agreements and license agreements,⁸⁴ including the many that *disadvantage* AT&T as compared to its competitors.⁸⁵ For example, the JUA, “in contrast to cable or telecommunications carrier pole lease agreements—reflect[s] a decades-old contractual responsibility [for AT&T] to share in infrastructure costs” and requires AT&T to “still own many poles today” and incur the associated pole ownership, maintenance, and disposal costs.⁸⁶ Also, because “ILECs, unlike CLEC and [cable] pole licensees, own numerous poles to which electric utilities are attached,”⁸⁷ AT&T must provide Duke Energy Progress each and every alleged “benefit” that Duke Energy Progress claims to provide to AT&T under the JUA.⁸⁸ CLECs do not incur a similar obligation or its attendant costs.⁸⁹ AT&T is also competitively disadvantaged by the lack of guaranteed access to Duke Energy Progress’s poles; under the JUA, AT&T may be denied the right to attach to new pole lines at any time, without the statutorily guaranteed access its competitors enjoy.⁹⁰ These significant competitive *disadvantages* for AT&T—with no associated actual and material competitive advantages alleged—establish that

⁸⁴ *Pole Attachment Order*, 26 FCC Rcd at 5335 (¶ 216 n.654) (emphasis added).

⁸⁵ Ex. C at ATT00044-48 (Peters Aff. ¶¶ 18-26); Ex. D at ATT00070-72 (Dippon Aff. ¶¶ 38, 41).

⁸⁶ *Pole Attachment Order*, 26 FCC Rcd at 5335 (¶ 216 n.654); Ex. C at ATT00044-45 (Peters Aff. ¶¶ 18-19); Ex. D at ATT00070-71 (Dippon Aff. ¶ 38); *see also* Brief of Duke Energy, et al. at 10, *Am. Elec. Power Serv. Corp. v. FCC*, No. 19-70490 (9th Cir. filed June 24, 2019) (“Duke Energy 9th Cir. Br.”) (stating that joint use agreements require ILECs to incur “capital costs necessary to build the pole network and the ongoing operating costs of the network”).

⁸⁷ Duke Energy 9th Cir. Br. at 46.

⁸⁸ Ex. C at ATT00047-48 (Peters Aff. ¶ 26); Ex. D at ATT00072 (Dippon Aff. ¶ 41).

⁸⁹ Ex. C at ATT00047-48 (Peters Aff. ¶ 26); Ex. D at ATT00072 (Dippon Aff. ¶ 41).

⁹⁰ Ex. 1 at ATT00094, ATT00104 (JUA, Arts. II, XVII(B)); *see also* Ex. C at ATT00047 (Peters Aff. ¶ 25); 47 U.S.C. § 224(f).

the just and reasonable rate for AT&T's use of Duke Energy Progress's poles is the new telecom rate even if the presumption does not attach.⁹¹

C. AT&T Should Pay A Properly Calculated New Telecom Rate And Be Refunded Its Overpayments.

31. Because the new telecom rate is the just and reasonable rate under the Commission's new telecom rate presumption and the standard it adopted in 2011, Duke Energy Progress must charge AT&T a properly calculated new telecom rate determined in accordance with 47 C.F.R. § 1.1406(d)(2).⁹² The best data available to AT&T shows that the applicable new telecom rates for AT&T's use of Duke Energy Progress's poles are \$7.16, \$7.30, and \$7.84 per pole for the 2017 through 2019 rental years, respectively.⁹³ These rates were calculated using Duke Energy Progress's FERC Form 1 data, rate of return data from the applicable State Commissions, distribution pole counts provided by Duke Energy Progress, and the Commission's presumptive inputs for pole height (37.5 feet), unusable space (24 feet), space occupied by AT&T (1 foot), average number of attaching entities in an urbanized area (5), and electric utility appurtenance factor (15%).⁹⁴

32. The Commission should order Duke Energy Progress to refund the millions of dollars that AT&T has paid in excess of the just and reasonable rate, "plus interest, consistent

⁹¹ See *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.478) ("[T]he 2011 *Pole Attachment Order*'s guidance regarding review of [I]LEC pole attachment complaints will continue to apply" where the presumption does not).

⁹² 47 C.F.R. § 1.1413(b); see also *FPL 2015 Order*, 30 FCC Rcd at 1142 (¶ 7) (quoting *Pole Attachment Order*, 26 FCC Rcd at 5336 (¶ 217)) ("competitive neutrality counsels in favor of affording [I]LECs the same rate as the comparable provider, *i.e.*, the New Telecom Rate"); (internal quotation mark omitted).

⁹³ Ex. A at ATT00007 (Rhinehart Aff. ¶ 11).

⁹⁴ *Id.* at ATT00003-07, ATT00012-16 (Rhinehart Aff. ¶¶ 4-11 & Exs. R-1 – R-2).

PUBLIC VERSION

with the applicable statute of limitations.”⁹⁵ The applicable statute of limitations is 3 years because this action involves a North Carolina contract,⁹⁶ and the Commission treats disputes involving the rates, terms, and conditions of pole attachment agreements consistently “with the way that claims for monetary recovery are generally treated under the law.”⁹⁷ This follows from a long line of precedent that “[w]hen there is no statute of limitations expressly applicable to a federal statute, ‘the general rule is that a state limitations period for an analogous cause of action is borrowed and applied to the federal claim.’”⁹⁸ And where, as here, the federal claim involves a contract, “contract law provides the best analogy” and the court should “adopt the general contract law statute of limitations.”⁹⁹ Thus, in the *Dominion Order*, the Enforcement Bureau cited the parties’ agreement to the applicability of a 5-year statute of limitations for

⁹⁵ 47 C.F.R. § 1.1407(a)(3).

⁹⁶ See Ex. 1 at ATT00106 (JUA, Art. XX(B)) (“This Agreement shall be governed by the laws of the State of North Carolina...”); N.C. Gen. Stat. § 1-52(1). The comparable statute of limitations in South Carolina is also 3 years. See S.C. Code Ann. § 15-3-530(1).

⁹⁷ See *Pole Attachment Order*, 26 FCC Rcd at 5289-90 (¶¶ 110-12); see also *In the Matter of Implementation of Section 224 of the Act; A Nat’l Broadband Plan for Our Future*, 25 FCC Rcd 11864, 11902 (¶ 88) (2010) (“Generally speaking, a plaintiff is entitled to recompense going back as far as the applicable statute of limitations allows. There does not appear to be a justification for treating pole attachment disputes differently.”).

⁹⁸ *Hoang v. Bank of Am., N.A.*, 910 F.3d 1096, 1101 (9th Cir. 2018) (quoting *Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 240 (1985)). See also *Spiegler v. District of Columbia*, 866 F.2d 461, 463-64 (D.C. Cir. 1989) (“When Congress has not established a statute of limitations for a federal cause of action, it is well-settled that federal courts may ‘borrow’ one from an analogous state cause of action, provided that the state limitations period is not inconsistent with underlying federal policies.”).

⁹⁹ *Hoang*, 910 F.3d at 1101. Moreover, the Commission could have, but did not, specify a one-size-fits-all federal statute of limitations, further reinforcing that the “applicable statute of limitations” is drawn from state law.

actions involving a Virginia contract.¹⁰⁰ The comparable statute of limitations in North Carolina (and South Carolina) is 3 years.¹⁰¹

33. To date, AT&T has overpaid Duke Energy Progress nearly [REDACTED] million during the applicable 3-year statute of limitations based on proportional new telecom rates for both parties.¹⁰² The Commission should require Duke Energy Progress to refund these amounts, which were collected in violation of federal law. The refund will be consistent with the Commission's intention that "monetary recovery in a pole attachment action extend as far back in time as the applicable statute of limitations allows."¹⁰³ Any other result "discourages pre-complaint negotiations between the parties," "fails to make injured attachers whole, and is inconsistent with the way that claims for monetary recovery are generally treated under the law."¹⁰⁴ And here, AT&T should be made as whole as possible for the unjust and unreasonable rates that it has paid Duke Energy Progress, which Duke Energy Progress has invoiced in violation of federal law for many more years than covered by the applicable statute of limitations period.¹⁰⁵ By awarding refunds, the Commission can reduce the harm from Duke Energy

¹⁰⁰ See *Dominion Order*, 32 FCC Rcd at 3764 (¶ 28 n.104) (citing Va. Code § 8.01-246(2)).

¹⁰¹ See N.C. Gen. Stat. § 1-52(1). The comparable statute of limitations in South Carolina is also 3 years. See S.C. Code Ann. § 15-3-530(1). AT&T seeks refunds for the entirety of the time period covered by the applicable statute of limitations. To the extent the Commission decides a longer statute of limitations than the 3-year State law statute of limitations applies, AT&T has provided rental rate and overpayment calculations for two additional rental years. See Ex. A at ATT00013-14, ATT00021-23 (Rhinehart Aff., Exs. R-1, R-4).

¹⁰² Ex. A at ATT00008-09, ATT00023 (Rhinehart Aff. ¶ 15 & Ex. R-4) (calculating a net rental overpayment of [REDACTED] for the 2017 – 2019 rental years); Ex. B at ATT00028 (Miller Aff. ¶ 8).

¹⁰³ *Pole Attachment Order*, 26 FCC Rcd at 5290 (¶ 112).

¹⁰⁴ *Id.* at 5289 (¶ 110).

¹⁰⁵ See Ex. B at ATT00028 (Miller Aff. ¶ 9).

PUBLIC VERSION

Progress's longstanding violation of federal law, inform negotiations, and confirm for the industry that it will enforce the ILEC rate reforms that were "designed to promote competition and increase the availability of robust, affordable telecommunications and advanced services to consumers throughout the nation."¹⁰⁶

IV. COUNT I – UNJUST AND UNREASONABLE RATES

34. AT&T incorporates paragraphs 1 through 33 as if fully set forth herein.

35. The Commission is statutorily required to ensure that the pole attachment rates that Duke Energy Progress charges AT&T are just and reasonable.¹⁰⁷

36. The rates that Duke Energy Progress charges AT&T under the JUA are, and have long been, unjust and unreasonable in violation of 47 U.S.C. § 224.

37. The just and reasonable rate for AT&T's attachments to Duke Energy Progress's poles is the new telecom rate under the presumption adopted in the 2018 *Third Report and Order* and the principle of competitive neutrality adopted in the 2011 *Pole Attachment Order*.¹⁰⁸ The following table includes the new telecom rates, calculated using the best data available to AT&T for its use of Duke Energy Progress's poles and the proportional new telecom rates that would apply to Duke Energy Progress's use of AT&T's poles:¹⁰⁹

¹⁰⁶ *Pole Attachment Order*, 26 FCC Rcd at 5241 (¶ 1).

¹⁰⁷ 47 U.S.C. § 224(b)(1).

¹⁰⁸ See *Third Report and Order*, 33 FCC Rcd at 7769 (¶ 126); *Pole Attachment Order*, 26 FCC Rcd at 5336-37 (¶ 218).

¹⁰⁹ Ex. A at ATT00008 (Rhinehart Aff. ¶ 14). There is one new telecom rate for AT&T's use of Duke Energy Progress's poles in North and South Carolina because Duke Energy Progress reports the relevant cost data in one combined FERC Form 1. *Id.* at ATT00006 (Rhinehart Aff. ¶ 9). There are different new telecom rates for Duke Energy Progress's use of AT&T's poles because AT&T North Carolina and AT&T South Carolina separately report the relevant cost data. See *id.* at ATT00008 (Rhinehart Aff. ¶ 14).

	2017	2018	2019
New telecom rate for AT&T's use of Duke Energy Progress's poles in North and South Carolina (per pole)	\$7.16	\$7.30	\$7.84
Proportional new telecom rate for Duke Energy Progress's use of AT&T North Carolina's poles (per pole)	\$10.64	\$8.50	\$8.95
Proportional new telecom rate for Duke Energy Progress's use of AT&T South Carolina's poles (per pole)	\$7.41	\$7.01	\$5.06

Because Duke Energy Progress denied AT&T these just and reasonable rates, AT&T has overpaid Duke Energy Progress by over [REDACTED] million in net pole attachment rentals each year during the relevant refund period, for a total overpayment of nearly [REDACTED] million during the last 3 years.¹¹⁰

38. Alternatively, even if Duke Energy Progress could show that the JUA provides AT&T a net material advantage over its competitors, the just and reasonable rate for AT&T's use of Duke Energy Progress's poles is not higher than the rate calculated using the FCC's pre-existing telecom formula.¹¹¹ The following table includes the pre-existing telecom rates, calculated using the best data available to AT&T for its use of Duke Energy Progress's poles and the proportional pre-existing telecom rates that would apply to Duke Energy Progress's use of AT&T's poles:¹¹²

¹¹⁰ *Id.* at ATT00009-10, ATT00023 (Rhinehart Aff. ¶ 15 & Ex. R-4) (calculating overpayment for 2015 – 2019 rental years and showing overpayment for the 2017 – 2019 years was [REDACTED] using new telecom rental rates for AT&T and Duke Energy Progress); Ex. B at ATT00028 (Miller Aff. ¶ 8).

¹¹¹ *See Third Report and Order*, 33 FCC Rcd at 7771 (¶ 129); *Pole Attachment Order*, 26 FCC Rcd at 5336-37 (¶ 218).

¹¹² Ex. A at ATT00010 (Rhinehart Aff. ¶ 19). There is one pre-existing telecom rate for AT&T's use of Duke Energy Progress's poles in North and South Carolina because Duke Energy Progress reports the relevant cost data in one combined FERC Form 1. *Id.* at ATT00006 (Rhinehart Aff. ¶ 9). There are different pre-existing telecom rates for Duke Energy Progress's use of AT&T's poles because AT&T North Carolina and AT&T South Carolina separately report the relevant cost data. *See id.* at ATT00008 (Rhinehart Aff. ¶ 14).

PUBLIC VERSION

	2017	2018	2019
Pre-existing telecom rate for AT&T's use of Duke Energy Progress's poles in North and South Carolina (per pole)	\$10.84	\$11.07	\$11.88
Proportional pre-existing telecom rate for Duke Energy Progress's use of AT&T North Carolina's poles (per pole)	\$16.12	\$12.87	\$13.55
Proportional pre-existing telecom rate for Duke Energy Progress's use of AT&T South Carolina's poles (per pole)	\$11.22	\$10.63	\$7.66

Under these alternative circumstances, AT&T has overpaid Duke Energy Progress by over \$3 million in net pole attachment rentals each year during the relevant refund period, for a total overpayment of over [REDACTED] million during the last 3 years.¹¹³

V. REQUEST FOR RELIEF

39. AT&T respectfully requests that the Commission find that Duke Energy Progress charged and continues to charge AT&T unjust and unreasonable rates in violation of federal law.

40. AT&T respectfully requests that the Commission set the just and reasonable rate, effective consistent with the applicable statute of limitations and going forward, as the rate that is properly calculated in accordance with the new telecom rate formula.

41. Alternatively, if Duke Energy Progress attempts to rebut the presumption, and the Commission concludes that Duke Energy Progress has met its burden to prove by clear and convincing evidence that the JUA provides AT&T a net material advantage over its competitors, AT&T respectfully requests that the Commission set the just and reasonable rate, effective consistent with the applicable statute of limitations, at a rate justified by the proven ongoing per

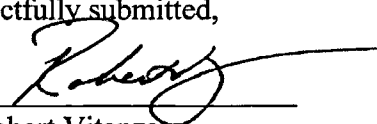
¹¹³ *Id.* at ATT00010-11, ATT00023 (Rhinehart Aff. ¶ 20 & Ex. R-4) (calculating overpayment for 2015 – 2019 rental years and showing overpayment for the 2017 – 2019 years was [REDACTED] using pre-existing telecom rental rates for AT&T and Duke Energy Progress); Ex. B at ATT00028 (Miller Aff. ¶ 8).

pole value of the net material competitive advantages and no higher than the rate that is properly calculated in accordance with the pre-existing telecom rate formula.

42. AT&T respectfully requests that the Commission order Duke Energy Progress to refund all amounts paid in excess of a just and reasonable rate consistent with the applicable statute of limitations and grant AT&T such other relief as the Commission deems just, reasonable, and proper.

Respectfully submitted,

By:


Robert Vitanza
Gary Phillips
David Lawson
AT&T SERVICES, INC.
1120 20th Street NW, Suite 1000
Washington, DC 20036
(214) 757-3357

Christopher S. Huther
Claire J. Evans
Frank Scaduto
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006
(202) 719-7000
chuther@wiley.law
cevans@wiley.law
fscaduto@wiley.law

Dated: September 1, 2020

*Attorneys for BellSouth Telecommunications,
LLC d/b/a AT&T North Carolina and d/b/a
AT&T South Carolina*

INFORMATION DESIGNATION

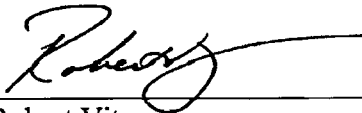
1. The AT&T employees with relevant information about this rental rate dispute are identified in this Pole Attachment Complaint and its supporting Affidavits and Exhibits.

2. The Joint Use Agreement and correspondence exchanged by the parties during the rental rate negotiations, except to the extent such correspondence contains confidential and privileged settlement communications designated under Federal Rule of Evidence 408 and its state law equivalents, are attached as Exhibits to this Pole Attachment Complaint. Additional correspondence exchanged by the parties is already in Duke Energy Progress's possession. Also attached are Affidavits from AT&T employees involved in the rate negotiations, as well as from outside expert Christian M. Dippon, Ph.D., calculations of the rental rates that result from the Commission's new and pre-existing telecom rate formulas, and calculations of the amounts that Duke Energy Progress has collected in violation of 47 U.S.C. § 224(b).

3. Should Duke Energy Progress seek to rebut the new telecom rate presumption, additional information will become relevant. AT&T previously sought to obtain some of this information from Duke Energy Progress, such as a complete set of executed license agreements, and the support and quantification of the value associated with any competitive "benefit" that Duke Energy Progress believes would justify a rental rate higher than the properly calculated new telecom rate. AT&T seeks such information in interrogatories being served contemporaneously with this Pole Attachment Complaint. AT&T reserves the right to rely on information that is not appended to this Pole Attachment Complaint if it is provided by Duke Energy Progress or becomes relevant.

RULE 1.721(M) VERIFICATION

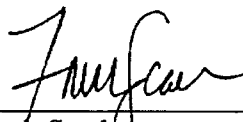
I, Robert Vitanza, as signatory to this submission, hereby verify that I have read this Pole Attachment Complaint and, to the best of my knowledge, information, and belief formed after reasonably inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding.



Robert Vitanza

DECLARATION OF PAYMENT

I, Frank Scaduto, counsel for Complainant BellSouth Telecommunications, LLC d/b/a AT&T North Carolina and d/b/a AT&T South Carolina ("AT&T"), hereby declare, under penalty of perjury, that AT&T paid the \$285 filing fee electronically using the Commission's electronic filing and payment system "Fee Filer" (www.fcc.gov/feefiler) on August 31, 2020, as required by Section 1.1106 of the Commission's Rules, 47 C.F.R. § 1.1106. AT&T's 10-digit FCC Registration Number is 0020882668.



Frank Scaduto

CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2020, I caused a copy of the foregoing Complaint, Affidavits, and Exhibits in support thereof, to be served on the following (service method indicated):

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
9050 Junction Drive
Annapolis Junction, MD 20701
(confidential version of Complaint,
Affidavits, and Exhibits by hand delivery;
public version of Complaint, Affidavits,
and Exhibits by ECFS)

Duke Energy Progress, LLC
c/o CT Corporation System
160 Mine Lake Court
Suite 200
Raleigh, NC 27615
(confidential and public versions of
Complaint, Affidavits, and Exhibits by hand
delivery)

Kimberly D. Bose, Secretary
Nathaniel J. Davis, Sr., Deputy Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426
(public version of Complaint, Affidavits,
and Exhibits by overnight delivery)

Public Service Commission of South Carolina
101 Executive Center Drive
Suite 100
Columbia, SC 29210
(public version of Complaint, Affidavits, and
Exhibits by overnight delivery)

North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, NC 27699 (public version of
Complaint, Affidavits, and Exhibits by
overnight delivery)



Frank Scuduto

PUBLIC VERSION

**Before the
Federal Communications Commission
Washington, DC 20554**

BELLSOUTH
TELECOMMUNICATIONS, LLC
d/b/a AT&T NORTH CAROLINA and
d/b/a AT&T SOUTH CAROLINA,

Complainant,

v.

DUKE ENERGY PROGRESS, LLC,

Defendant.

Proceeding No. 20-____
Bureau ID No. EB-20-MD-____

Affidavits

- A. Affidavit of Daniel P. Rhinehart (August 31, 2020).
- B. Affidavit of Dianne W. Miller (August 31, 2020).
- C. Affidavit of Mark Peters (August 31, 2020).
- D. Affidavit of Christian M. Dippon, Ph.D. (August 31, 2020).

Exhibits

- 1. Amended and Restated Agreement Covering Joint Use of Poles Between Carolina Power & Light Company ("Duke Energy Progress") and BellSouth Telecommunications, Inc. ("AT&T"), executed Oct. 20, 2000, as updated.
- 2. Draft "Telecommunications Pole Attachment License Agreement Between Duke Energy Progress, LLC and ____."
- 3. Invoices from Duke Energy Progress to AT&T North Carolina for the 2017 – 2019 Rental Years.
- 4. Invoices from Duke Energy Progress to AT&T South Carolina for the 2017 – 2019 Rental Years.
- 5. Invoices from Duke Energy Progress to AT&T North Carolina for the 2011 – 2016 Rental Years.

6. Invoices from Duke Energy Progress to AT&T South Carolina for the 2011 – 2016 Rental Years.
7. 1987 Pole Count Information.
8. Letter from D. Miller, AT&T, to S. Freeburn, Duke (May 22, 2019).
9. Emails between D. Miller, AT&T, and S. Freeburn, Duke (May 22 – June 18, 2019).
10. Letter from D. Miller, AT&T, to S. Freeburn, Duke (Sept. 5, 2019).
11. Emails between D. Miller, AT&T, and S. Freeburn, Duke (Sept. 6 – 12, 2019).
12. Emails between D. Miller, AT&T, and S. Freeburn, Duke (Nov. 7, 2019).
13. Email and Letter from S. Freeburn, Duke, to D. Miller, AT&T (Nov. 13, 2019).
14. Emails between D. Miller, AT&T, and S. Freeburn, Duke (Nov. 13 – Dec. 4, 2019).
15. Emails between D. Miller, AT&T, and S. Freeburn, Duke (Dec. 13 – 18, 2019) (without attachments).
16. Email from S. Freeburn, Duke, to D. Miller, AT&T (Jan. 16, 2020).
17. Emails between D. Miller, AT&T, and S. Freeburn, Duke (Jan. 30 – Feb. 18, 2020).
18. Aerial Facility Damage Reports.
19. Excerpt, Duke Energy's Form 10-K for the year ended Dec. 31, 2019.
20. Excerpt, Order Granting General Rate Increase, Docket No. E-2, Sub 1023 (N.C. Util. Comm'n 2013).
21. Excerpt, Order Accepting Stipulation, Deciding Contested Issues and Granting Partial Rate Increase, Docket No. E-2, Sub 1142 (N.C. Util. Comm'n 2018).
22. Excerpt, Order on Remand, Docket No. 88-11-E (S.C. Pub. Serv. Comm'n 1990).
23. Excerpt, Order Approving Increase in Rates and Charges and Settlement Agreement, Docket No. 2016-227-E (S.C. Pub. Serv. Comm'n 2016).
24. Excerpt, Order No. 2019-341, Docket No. 2018-318-E (S.C. Pub. Serv. Comm'n 2019).